Office Supreme Court, U.S.
FILED
JUL 28 1983
ALEXANDER L. STEVAS,
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No. 82-629

In The
Supreme Court of the United States
October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., and SCHMIDT, SMITH & RUSH, P.C.,
Respondents.

On Certiorari to the Supreme Court of North Dakota

PETITIONER'S BRIEF

JOHN O. HOLM,*
17 Second Avenue West
Dickinson, North Dakota 58601
(701) 225-6066

CHRISTOPHER D. QUALE
RAYMOND CROSS
Box 220
New Town, North Dakota 58763
(701) 627-3621

Counsel for Petitioner

July 1983

*Counsel of Record

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether Public Law 280 authorizes a state to enact a statute barring an Indian's claim for damages, due to the negligent design of a water intake system on-reservation, against a non-Indian engineering firm, unless the affected Indians vote to accept state jurisdiction under state law.

2. Whether federal policy embodied in decisional law and in Public Law 280, as amended, providing, among other things, for the orderly transfer of limited federal authority over Indian affairs to the states, should be understood as prohibiting state judicial jurisdiction over suits brought by Indians against non-Indian defendants under state law where no interference with tribal or federal regulatory interests is involved.

3. Whether Chapter 27-19 of the North Dakota judicial code, consistent with the Equal Protection and Due Process clauses of the Fourteenth Amendment, should be regarded as depriving Indian plaintiffs of a forum for enforcement of state-created rights.

PARTIES TO THE ACTION

The parties to this proceeding are the Three Affiliated Tribes of the Fort Berthold Reservation, Petitioner; Wold Engineering, P.C., a North Dakota professional corporation, Respondent; and, Schmidt, Smith & Rush, Respondent.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Action	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	2
Summary of Argument	5
Argument:	
I. North Dakota has no state policy barring Indian suits based on state law against non-Indians in State Court.	9
A. Introduction	9
B. State law authorized Indian suits against non-Indians before the enactment of Chapter 27-19 of the North Dakota Century Code.	10
C. The State Court construed Chapter 27-19 of the State Judicial Code as constituting a federally authorized disclaimer of state jurisdiction over all Indian claims arising on-reservation.	10
II. Federal policy does not require an absolute bar against state judicial jurisdiction over suits by Indians against non-Indian defendants under state law where no interference with federal or tribal interests is involved.	14
A. North Dakota has adopted federal law as the governing limit on its judicial power over Indians.	14

TABLE OF CONTENTS—Continued

Page

B. North Dakota's failure to accept Public Law 280 jurisdiction does not bar the Tribe's negligence action against a non-Indian in state court. 16

C. There is no federal decisional rule barring petitioner's action in state court. 27

III. Congress did not consent to, or authorize, North Dakota's enactment of Chapter 27-19 of its judicial code. 32

A. Congress imposed, through Section 7 of Public Law 280, strict requirements that North Dakota failed to meet. 32

B. Congress by its 1968 amendments to Public Law 280, has rendered moot the state court's assumption that petitioner must consent, as a matter of federal law, under Chapter 27-19 of the state judicial code as a prerequisite to state court's jurisdiction over petitioner's action. 34

IV. Chapter 27-19 of the North Dakota Judicial Code, as construed by the State Supreme Court, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 38

A. Introduction 38

B. The State Statute clearly conflicts with the Petitioner's Due Process rights. 40

C. The appropriate standard of judicial review of this state legislation is strict scrutiny. 44

D. The state law in question does not represent the least restrictive solution to any jurisdictional concerns the state may have. 47

Conclusion 48

Appendix A. 1

TABLE OF AUTHORITIES

Pages

UNITED STATES SUPREME COURT CASES:

Arizona v. San Carlos Apache Tribe, 51 U. S. L. W. 5095 (U. S. June 28, 1983) 6, 7, 26, 27

Breisch v. Central R. R., 312 U. S. 484 (1941) 15

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673 (1930) 41

Bryan v. Ithasca County, 426 U. S. 373 (1976) 19, 27

The Civil Rights Cases, 109 U. S. 3 (1883) 39

Felix v. Patrick, 145 U. S. 317 (1982) 28

Fisher v. District Court, 424 U. S. 382 (1976) 29

Kennerly v. District Court, 400 U. S. 423 (1971) ..... *passim*

Logan v. Zimmerman Brush Co., 455 U. S. 422 (1982) 43

Loving v. Virginia, 388 U. S. 1 (1967) 44

Lynch v. Household Finance Corporation, 405 U. S. 538 (1971) 42, 43

McClanahan v. Arizona State Tax Commission, 411 U. S. 164 (1973) 26, 28, 29, 31

Mobile & S. Ohio R. R. v. Tennessee, 153 U. S. 486 (1894) 24

Morton v. Mancari, 417 U. S. 535 (1974) 44

Murry's Lessee v. Hoboken Land and Improvement Co., 18 U. S. (How.) 272 (1856) 24

Plyer v. Doe, 457 U. S. 202 (1982) 44, 45, 46

Sniadich v. Family Finance Corp., 395 U. S. 337 (1969) 42, 43

Tipton v. Atchison T. & S. F. Ry., 298 U. S. 141 (1936) 15

TABLE OF AUTHORITIES—Continued

	Pages
United States v. O'Brien, 391 U. S. 367 (1968)	45
United States v. Carolene Products, 304 U. S. 144 (1938)	40, 43
United States v. Chicago R. I. & P. R. Co., 282 U. S. 311 (1931)	32
United States v. Kagama, 118 U. S. 375 (1886)	19, 45
Warren Trading Post v. Arizona State Tax Commission, 380 U. S. 685 (1965)	30, 31
Washington v. Yakima Indian Nation, 439 U. S. 463 (1979)	*passim*
Williams v. Lee, 358 U. S. 217 (1959)	*passim*
Worcester v. Georgia, 31 U. S. (6 Pet.) 515 (1832)	6
OTHER FEDERAL CASES:	
Agua Caliente Band of Mission Indians v. Palm Springs, 347 F. Supp. 42 (C. D. Cal. 1974)	21
Anderson v. Gladden, 293 F. 2d 463 (9th Cir. 1961)	20
Bird v. Terry, 129 F. 472 (C. C. W. D. Wash. 1903)	25
City of New Town v. U. S., 454 F. 2d 121 (8th Cir. 1972)	2
Corfield v. Coryell, Case No. 3230, 4 Wash. at 371 (C. C. E. D. Pa. 1823)	40
Deere v. New York, 22 F. 2d 851 (N. D. N. Y. 1927)	25
Omaha Tribe v. Walthill, 334 F. Supp. 823 (D. Neb. 1971), *affirmed*, 460 F. 2d 1327 (8th Cir. 1972)	27
Poitra v. Demarrias, 502 F. 2d 23 (8th Cir. 1974), *reversing*, 369 F. Supp. 257 (D. N. D. 1973)	13
Quechan Tribe v. Rowe, 531 F. 2d 408 (9th Cir. 1976)	31

TABLE OF AUTHORITIES—Continued

Pages

Robinson v. Wolff, 349 F. Supp. 514 (D. Neb.), *affirmed*, 468 F. 2d 438 (8th Cir. 1972) 21

Schantz v. White Lightning, 502 F. 2d 67 (8th Cir. 1974) 41

STATE CASES:

Gourneau v. Smith, 207 N. W. 2d 256 (N. D. 1973) 12, 13, 30

Lohnes v. Cloud, 254 N. W. 2d 430 (N. D. 1977) 41

Morgan v. Colorado River Indian Tribe, 7 Ariz. App. 92, 436 P. 2d 484, *vacated on other grounds*, 103 Ariz. 425, 443 P. 2d 421 (1968) 34

Nelson v. Dubois, 232 N. W. 2d 64 (N. D. 1975) 37

Robinson v. Sigler, 187 Neb. 144, 187 N. W. 2d 756, *appeal dismissed*, 404 U. S. 987 (1971) 21

Rolette County v. Eltobgi, 221 N. W. 2d 645 (N. D. 1974) 13, 39, 46

Schantz v. White Lightning, 231 N. W. 2d 812 (N. D. 1975) 12

State v. Molash, 86 S. D. 558, 199 N. W. 2d 591 (1972) 34

Three Affiliated Tribes v. Wold Engineering, 321 N. W. 2d 510 (N. D. 1982) 1, 14, 22, 45

Vermillion v. Spotted Elk, 85 N. W. 2d 342 (N. D. 1957) 10, 12

White Eagle v. Dorgan, 209 N. W. 2d 621 (N. D. 1973) 13

In re White Shield, 124 N. W. 2d 694 (N. D. 1963) 12

Whyte v. District Court, 140 Colo. 334, 346 P. 2d 1012 (1959), *cert. denied*, 363 U. S. 829 (1960) 34

TABLE OF AUTHORITIES—Continued

Pages

UNITED STATES CONSTITUTION:

U. S. Const., art. XIV, § 1 ..... *passim*

UNITED STATES STATUTES:

North Dakota's Enabling Act, § 4, 25 Stat. 677 1

8 U. S. C. § 1401 (2) 19

28 U. S. C. § 1257 (3) 1

Public Law 280 of 1953, Ch. 505, Sections 6 and 7, 67 Stat. 589. Section 7 was repealed by Section 403 (b) of P. L. 90-284, 82 Stat. 79. Section 6 was reenacted by Section 404 of that same statute and is now codified at 25 U. S. C. § 1324. Section 402 (a) is codified at 25 U. S. C. § 1322 (a). Section 406 is codified at 25 U. S. C. § 1326 ..... *passim*

NORTH DAKOTA CONSTITUTION:

N. D. Const., art. I, § 22 ..... 2, 24, 39

N. D. Const., art. XVI, § 203, amended and renumbered as art. XIII, § 1 ..... 2, 5, 11

NORTH DAKOTA STATUTES:

N. D. Cent. Code § 27-19-01 ..... *passim*

N. D. Cent. Code § 27-19-02 (1) 37

N. D. Cent. Code § 27-19-02 (2) 2, 35

N. D. Cent. Code § 27-19-05 ..... 2, 37

FEDERAL REPORTS AND HEARINGS:

Background Report on Public Law 280, Committee on Interior and Insular Affairs, U. S. Senate, 94th Cong., 1st Sess. (1975) 20, 21, 34, 35

TABLE OF AUTHORITIES—Continued

Pages

Hearings on H. R. 1519, Before the House Subcommittee on Indian Affairs, 90th Cong., 2d Sess. (March 29, 1968) ——— 35

H. Rep. No. 848, 83rd Cong., 1st Sess. (1953) ——— 17, 19

S. Rep. No. 699, 83rd Cong., 1st Sess. (1953) ——— 17, 18, 19

S. Rep. No. 841, 90th Cong., 1st Sess. (1967) ——— 35

Hearings on H. R. 1063, Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (June 29, 1953), Transcript I ——— 17, 18

Hearings on H. R. 1063, Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (July 15, 1953), Transcript II ——— 17, 23

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Deaby, *The Growth of American State Constitutions*, (DeCapo Press, 1972) ——— 39

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Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Col. L. Rev. 321 (1935) ——— 37

Kutner, *Can Federal Courts Remain Open when State Courts are Closed? Erie Tompkins on the Indian Reservation*, 52 N. D. L. Rev. 647 (1975) ——— 13

TABLE OF AUTHORITIES—Continued

Pages

Linde, *Due Process of Law Making*, 55 Neb. L. Rev. 197 (1976) 47

Schwartz, *Statutory History of the United States: Civil Rights*, Part 1 40

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On Certiorari to the Supreme Court of North Dakota

PETITIONER'S BRIEF

OPINIONS BELOW

The judgment of dismissal of North Dakota for the Northwest Judicial District in Ward County, Civil No. 46392, is an unreported decision. The judgment of the North Dakota Supreme Court affirming the district court's dismissal of petitioner's action is reported at 321 N. W. 2d 510 (1982).

JURISDICTION

The decision and judgment of the Supreme Court of North Dakota was entered on July 1, 1982. This Court has jurisdiction over this case under 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the following constitutional provisions and statutes relevant to the determination of the present case are set forth in the Appendices:

Federal: U.S. Const. art. XIV, § 1; Section 4 of North Dakota's Enabling Act, 25 Stat. 677; Sections 6 and 7 of Public Law 280, 67 Stat. 589; Sections 402(a), 403(b), 404, and 406 of Public Law 90-284, 82 Stat. 79. Section 403(b) repealed Section 7 of Public Law 280. Section 404 re-enacted Section 6 of that same statute and is now codified at 25 U. S. C. § 1324 (1983). Section 402(a) is codified at 25 U. S. C. § 1322(a) (1983). Section 406 is codified at 25 U. S. C. § 1326 (1983).

State: North Dakota Const. art. XVI, § 203, amended and renumbered as art. XIII, § 1; art. I, § 22; N. D. Cent. Code §§ 27-19-01, 27-19-02(2), and 27-19-05.

STATEMENT OF THE CASE

This case concerns an action for damages brought by the Three Affiliated Tribes, a federally-recognized Indian tribe, against a non-Indian engineering firm. This case arose on the Fort Berthold Indian Reservation in North Dakota. That reservation had been set aside for the use and occupancy of the Mandan, Gros Ventre, and Arikara tribes by the Act of March 3, 1891, 26 Stat. 1032. *See City of New Town v. United States,* 454 F. 2d 121 (8th Cir. 1972).

Petitioner, the Three Tribes, contracted in 1974 with respondent, Wold Engineering Company. Wold is a professional corporation organized under the laws of North Dakota and has its principal office off-reservation in Bot-

tineau, North Dakota. Wold was employed by petitioner to design a public works project on the Fort Berthold Indian Reservation. The purpose of this project, known as the Four Bears Water Systems Project, was to provide a continuous, safe, and secure domestic water supply source to serve the needs of a portion of the reservation populace. This was to be accomplished by diverting water from Lake Sakakawea through an intake structure and pump system (J.A. 2).

Respondent undertook the project and had installed a submersible pump, built to its design specifications, on a pier of the Four Bears Bridge that crossed the Lake. That system was completed on July 29, 1977. However, that system was subject to continual failure and despite several attempts at correction by respondent, the system has never delivered a continuous supply of water as was contemplated by the project's purpose (J.A. 2-3).

Despite a meeting between the Tribe and Wold Engineering on March 21, 1979, there was no final resolution of the problems with the water system. Petitioner has spent more than $200,000.00 on this project (J.A. 3).

Petitioner commenced a negligence and breach of contract action against respondent on March 20, 1980 (J.A. 3). The cause of action for damages was based on Wold's negligent design of the project and on its breach of its contract with the Tribe (J.A. 2-3). Wold also sued Schmidt, Smith & Rush, a subcontractor that worked on that project, and brought it into the case as a third-party defendant (J.A. 9). State court jurisdiction over petitioner's negligence action against Wold is premised both on the service of process on respondent within the state in accordance with North Dakota law and the fact that the conduct of re-

spondent that forms the basis of petitioner's action occurred in North Dakota (J.A. 2).

On January 11, 1982, trial on petitioner's complaint was commenced in State District Court for the Northwest Judicial District. Wold moved the court that same day to dismiss the Tribe's action against it (J.A. 18). That motion was based on the ground that because the Tribe's cause of action arose on-reservation the state court, as a matter of federal law, lacked jurisdiction over the case entirely. Respondent's motion was granted by the trial judge on January 11, 1982 (J.A. 20).

Thus, petitioner was never accorded a hearing on the merits of its complaint against respondent. Instead, the trial court dismissed petitioner's action on a preliminary motion solely on the ground that it lacked subject matter jurisdiction over petitioner's cause of action. That dismissal was viewed by the court as required by federal law (J.A. 19-20).

On February 23, 1982, petitioner filed his Notice of Appeal to the Supreme Court of North Dakota (Pet. 2a). The Supreme Court of North Dakota issued its decision on July 1, 1982, affirming the district court's dismissal of petitioner's action (Pet. 3a).

In the course of the supreme court's decision it reviewed the history of state judicial jurisdiction over Indian claims arising on-reservation. The state supreme court, despite the fact that there was no state policy barring Indian suits against non-Indians in state court, concluded that it was compelled to affirm the dismissal of the action because of a federal law that prohibited state judicial authority over this type of action. This law is the Act of August 15, 1953, 67 Stat. 588, popularly known as Public Law 280. More particularly, the state supreme

court construed a state statute, Chapter 27-19 of the state judicial code, to require that state courts close their doors to Indian claims arising on-reservation. This state law was held to be authorized by Public Law 280.

The state had amended its state constitution in 1958 to remove the federally-imposed disclaimer over Indian lands within the state. N. D. Const. Art. XVI, § 203, amended and renumbered as art. XIII, § 1 (A. 3a). The state legislative assembly then enacted, in 1963, Chapter 27-19 of the North Dakota Century Code (A. 4a). It was this state law, as adopted under Public Law 280, that the supreme court deemed closed the state courts to Indians who sued on claims that arose on-reservation. The court construed the state statute, enacted under ostensible federal consent, as prohibiting civil jurisdiction over petitioner's claim until he consented to the exercise of state jurisdiction over the reservation.

The Tribe filed its Petition for Writ of Certiorari on September 28, 1982. This Court granted that Petition on April 25, 1983. 103 S. Ct. 1872 (1983). The Three Affiliated Tribes' Constitution, Chapter II, § 1(a), does not authorize the tribal court to exercise jurisdiction over non-Indians for civil jurisdictional purposes absent the non-Indian's consent to such jurisdiction.

SUMMARY OF ARGUMENT

The fundamental issue is whether the Supreme Court of North Dakota erred in affirming the dismissal by the state district court of the Three Affiliated Tribes' negligence action against a non-Indian engineering firm based on the ground that federal law either authorized or com-

pelled the adoption of a state statutory disclaimer, Chapter 27-19 of the state judicial code, of civil jurisdiction of suits by Indians against non-Indians arising on an Indian reservation.

Congress' authority and jurisdiction over the subject matter of Indian affairs was established early in this country's history. *Worcester v. Georgia,* 31 U. S. (6 Pet.) 515 (1832). *Worcester* has also been recognized as standing, at one time, for the principle of the virtually absolute independence of Indians on-reservation from state regulation. *Arizona v. San Carlos Apache Tribe,* 51 U. S. L.W. 5095, 5100 (U. S. June 28, 1983). However, this Court's more recent decisions have rejected the arbitrary and rigid concepts of jurisdiction based on territorial sovereignty in favor of an analysis of the interests underlying the competing jurisdictional claims of Indian tribes and states. *Williams v. Lee,* 358 U. S. 217 (1959).

The state supreme court concluded in its decision below that the implications of Congress' intent in enacting the jurisdictional statute known as Public Law 280 required North Dakota to close its courts' doors to suits by Indians against non-Indians if the suits arose on an Indian reservation within the state. Alternatively, the state court viewed Congress as consenting, under Public Law 280, to the adoption of a state statute implementing an amendment to the state constitution removing its congressionally-imposed disclaimer clause regarding Indian lands (A. 4a). This is the statute the state court construed as prohibiting state court jurisdiction over Indian claims arising on-reservation.

Petitioner considers as dispositive on this issue this Court's recent decision holding that, as a matter of federal

law, the presence or absence of a congressionally-required disclaimer clause in a state constitution is largely irrelevant as an analytic tool in deciding whether a state has jurisdiction over a specific Indian case or subject matter. *Arizona v. San Carlos Apache Tribe,* 51 U,S.L.W. 5095, 5100 (U.S. June 28, 1983). However, because this Court, in that decision, also indicated that deference should be paid to the construction that state courts place on the disclaimer clauses in their own constitutions, petitioner considers it necessary to show in some detail that North Dakota has no independent state law or policy barring Indian suits against non-Indians in state court. *Arizona v. San Carlos Apache Tribe,* 51 U.S.L.W. 5095, 5099 (U.S. June 28, 1983). Additionally, petitioner considers it necessary to show that there is no express or implied congressional intent behind the enactment of Public Law 280 that prohibits state jurisdiction over petitioner's action. Further, petitioner views the state supreme court's conclusion that Congress consented under that federal statute to the adoption of Chapter 27-19 of the state judicial code as equally erroneous in light of the plain terms of Public Law 280 and the decisions of this Court interpreting that act.

Petitioner submits that based on the repeated declarations by the North Dakota Supreme Court that the state has no independent state law or policy barring Indians from state court, that the sole issue for determination by this Court on review is whether federal law bars petitioner's action against respondent in state court. There is no explicit or implicit congressional intent behind Public Law 280 prohibiting states that did not accept the federal jurisdiction offered under that statute from adjudicating suits by Indians against non-Indians in state court where no significant federal or tribal interests are implicated.

Further, Congress did not intend to consent to, or authorize, under Public Law 280, the adoption of state statutes such as Chapter 27-19 of the North Dakota judicial code that has been interpreted by the state supreme court as completely barring Indian access to state courts if their claims arise on-reservation.

Federal law, and the decisions of this Court, have recognized the right of Indians to sue a non-Indian in state court to obtain a remedy for the wrongs done to them. There do exist special legal principles, based primarily on federal Indian treaties and statutes, that are intended to protect from state intrusion the unique cultural and political arrangements that define Indians as Indians. However, these principles have never precluded an Indian from suing a non-Indian in state court based on a state-created cause of action. It is equally clear that this Court has never allowed a non-Indian to use as a defense to an Indian's claim for relief against him federal principles of law intended solely to protect Indians in their unique status as Indians.

The state jurisdictional rule, embodied in its judicial code, closing its state courts entirely to Indians if their claims stem from an on-reservation transaction is not required by federal law as is supposed by the North Dakota Supreme Court. Indeed, this Court has recognized that where the wrongful conduct of a non-Indian is involved in a case it is entirely appropriate for a state court to assert its interest in regulating the conduct of that person under its state law. Further, while the state supreme court is entirely correct in its observation that a complex relationship exists—one that cannot be adequately described or summarized by a single criterion—between the Indian and the federal government, that relationship

neither requires nor justifies the state's exclusion of Indians from state court.

This state jurisdictional rule, by implication, would allow non-Indians to injure Indians without being answerable in state court. Such a rule would have grave consequences for the protection of the tribes' proprietary interests, especially in commercial transactions. Here, respondent received large sums of monies under a contract with the petitioner to build a public works project on-reservation.

This state jurisdictional rule, purportedly authorized or required by federal law, clearly is inconsistent with the decisions of this Court that have recognized that Indians can sue non-Indians in state court if no federal or tribal interests are violated by such an action. If the state jurisdictional rule is construed as being an independent state law barrier to petitioner's action, then that state law is clearly in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. North Dakota Has No State Policy Barring Indian Suits Based On State Law Against Non-Indians In State Court

A. Introduction

The state supreme court held in the decision below that North Dakota courts are barred as a matter of federal law from adjudicating Indian claims against non-Indians if those claims arise on a federal Indian reservation in the state. The federal law cited by the state court that ostensibly compels or authorizes the state courts to disclaim subject matter jurisdiction over these suits is the

Act of August 15, 1953, 67 Stat. 588, popularly known as Public Law 280.[1]

B. State Law Authorized Indian Suits Against Non-Indians Before The Enactment Of Chapter 27-19 Of The North Dakota Century Code

The Supreme Court of North Dakota had, prior to the enactment of Chapter 27-19, declared a state jurisdictional rule that allowed state courts to hear Indian suits arising from reservation transactions as long as the suits did not involve Indian lands held in trust by the United States. *See Vermillion v. Spotted Elk*, 85 N. W. 2d 342 (N. D. 1957). The decision in *Vermillion* reflects the state supreme court's consistent opinion that the disclaimer provision in the state's constitution, reading that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States," did not limit state court jurisdiction as long as the litigation did not affect Indian lands. *Id.*, at 438. But see, *William v. Lee*, 358 U. S. 217 (1959).

Therefore, the state supreme court found that its adjudicative authority, absent federal law to the contrary, extended to Indian suits on-reservation because Indians, as state citizens, were entitled to sue in state courts on the same terms as other citizens.

C. The State Court Construed Chapter 27-19 Of The State Judicial Code As Constituting A Federally Authorized Disclaimer Of State Jurisdiction Over All Indian Claims Arising On-Reservation

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[1]This case involves only Sections 6 and 7 of Public Law 280. Section 7 was repealed by Section 403(b) of Public Law 90-284, Act of April 11, 1968, 82 Stat. 79. Section 6 was reenacted by Section 404 of that Act and is now codified at 25 U.S.C. § 1324. (The full text of the relevant provisions of Public Law 280, including its amendments, is set forth in the Appendix.) (Hereinafter, Public Law 280 shall be referred to as Pub. L. 280.)

The State of North Dakota amended Section 203[2] of its constitution in 1958 in an effort to conform to what it perceived to be the federal jurisdictional requirements contained in Pub. L. 280. The disclaimer provision of the state constitution, after amendment, provided "for the acceptance of such jurisdiction as may be delegated to the State by Act of Congress . . ." N. D. Const. Art. XIII, § 1 (A. 3a). That amendment enabled the North Dakota state legislative assembly to enact such legislation as deemed proper and necessary to conform to the further federal requirements for state assumption of jurisdiction over Indians contained in Section 7 of Pub. L. 280.

The state legislative assembly, in 1963, enacted Chapter 27-19 of the North Dakota Century Code, reciting in the Preamble that the statute was passed in accordance with the provision of Pub. L. 280 "and providing that the jurisdiction of the State of North Dakota shall be extended over all civil causes of action which arise on Indian reservation upon acceptance by Indian citizens in a manner

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[2]North Dakota was both a so-called "optional" and a disclaimer state under Pub. L. 280's classification scheme. Therefore, not only was it required under Section 6 of that statute to, by appropriate action under state law, remove the disclaimer clause in its state constitution, it was also required to take "affirmative legislative action" concerning either civil or criminal jurisdiction over Indian affairs in order to comply with Section 7 of Pub. L. 280. (A. 5a.)

Section 7 of Pub. L. 280 controls, as a matter of federal law, the issue of what state legislation is sufficient to qualify for adequate acceptance of the federal jurisdictional offer. *See Kennerly v. District Court*, 400 U. S. 423, 425 (1971). North Dakota clearly failed, as a matter of federal law, to accept any of the jurisdictional responsibilities over Indians that were offered to it by Congress under Section 7 of that federal jurisdictional statute. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 493 (1979). North Dakota is now precluded from asserting unilateral jurisdiction over Indian affairs within the state by the repeal of Section 7 by Congress in 1968 and the enactment of 25 U.S.C. §§ 1322(a) and 1326. (A. 6a, 8a.)

provided by this section." N. D. Cent. Code § 27-19-01 (A. 4a).

The North Dakota Supreme Court interpreted the jurisdictional effect of the state legislative steps stemming from what the court perceived as federal authorization contained in Pub. L. 280 in *In re White Shield,* 124 N. W. 2d 694 (N. D. 1963). There, the court held that state courts have no jurisdiction over a proceeding for the termination of parental rights of Indian parents residing on an Indian reservation within North Dakota. The court's rationale for declining jurisdiction in that case was that the state legislature, through the exercise of the authority delegated to it by Congress in Sections 6 and 7 of Pub. L. 280, had disclaimed jurisdiction over that class of actions.

The state supreme court's decisions subsequent to *In re White Shield* expanded what the court perceived to be a federally imposed jurisdictional bar against state court jurisdiction over Indian cases. The jurisdictional rule as elaborated by that court's decision in *Gourneau v. Smith,* 207 N. W. 2d 256 (N. D. 1973)[3] and *Schantz v. White Lightning,* 231 N. W. 2d 812 (N. D. 1975), amounted to a complete bar against state court jurisdiction of civil actions arising on-reservation when the defendant happens to be an Indian.

The Supreme Court of North Dakota repeatedly added in these decisions that North Dakota has no independent policy barring Indian suits by Indian plaintiffs availing themselves of the state's courts as a forum for their actions. However, the court added, federal law, as accepted through the medium of state legislation, closed the state

[3]The North Dakota Supreme Court in this decision also expressly overruled *Vermillion v. Spotted Elk,* 85 N. W. 2d 342 (N. D. 1957).

courts to suits against Indian defendants. *Cf., Rolette County v. Eltobgi*, 221 N. W. 2d 645 (N. D. 1974).[4]

Despite these decisions by the state supreme court barring state court adjudication of actions involving Indian defendants, it had been presumed that there was no jurisdictional bar against Indian plaintiffs suing non-Indian defendants in state courts regardless of the situs of the action.[5] *See generally, Rolette County v. Eltobgi*, 221 N. W. 2d 645, 648 (N. D. 1974); *White Eagle v. Dorgan*, 209 N. W. 2d 621 (N. D. 1973). However, the North Dakota Supreme Court in the decision on review here extended its rationale regarding the perceived federal bar to state jurisdiction over any actions arising on-reservation to the new fact situation wherein an Indian plaintiff sues a non-Indian defendant in a civil cause of action arising from a reservation transaction.

The North Dakota Supreme Court relies directly on Pub. L. 280 in reaching its result in this case:

> Likewise the people of North Dakota and the Legislature were acting under explicit authority granted by

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[4]The Eighth Circuit Court of Appeals in *Poitra v. Demarrias*, 502 F. 2d 23 (8th Cir. 1974), *reversing*, 369 F. Supp. 257 (D.N.D. 1973), relied on the repeated declarations by the state of North Dakota Supreme Court that North Dakota had no state policy against the Indians suing in state court. On the contrary, the court of appeals found that, absent the perceived federal bar contained in Pub. L. 280, the North Dakota Supreme Court's opinion is that state courts are open to Indians. *Poitra*, at 27.

Therefore, the appeals court found that no state policy would be offended by allowing a diversity suit between two Indians stemming from a reservation transaction and with facts very similar to those presented in *Gourneau v. Smith*, 207 N. W. 2d 256 (N.D. 1973).

[5]See Kutner, *Can Federal Courts Remain Open when State Courts are Closed? Erie Tompkins on the Indian Reservation.* 52 N.D. L. Rev. 647 (1975).

> Congress in the exercise of its federal power over Indians when our Constitution was amended and Chapter 27-19 N.D.C.C. was enacted. We therefore find no equal protection violation of the Constitution of either the State or the United States, and for the reasons stated in this opinion, affirm the judgment of the district court. 321 N. W. 2d at 513.

The general jurisdictional rule after this decision is that the North Dakota courts lack jurisdiction over any case arising on a federal Indian reservation in North Dakota and involving an Indian as either party. This bar to state court jurisdiction arises, according to the state supreme court, as a matter of federal law. There is no independent state policy barring state court jurisdiction over Indian suits in state court.

II. Federal Policy Does Not Require An Absolute Bar Against State Judicial Jurisdiction Over Suits By Indians Against Non-Indian Defendants Under State Law Where No Interference With Federal Or Tribal Interests Is Involved

A. North Dakota Has Adopted Federal Law As The Governing Limit On Its Judicial Power Over Indians

The North Dakota Supreme Court regarded federal Indian law, particularly Pub. L. 280 and the decisions of this Court interpreting that statute, as compelling or authorizing the result below. According to the supreme court's rationale, the state legislature, in enacting Chapter 27-19 of the Century Code, adopted directly whatever jurisdictional limitations Pub. L. 280 imposed directly, or as a matter of interpretation by this Court, as a substantive jurisdictional rule binding on the state courts.

The commendable intent of the North Dakota legislature to achieve judicial administration consistent with federal law by requiring the state courts to read the meaning of Chapter 27-19 through this Court's interpretation of Pub. L. 280 cannot be denied. However, once the state legislature chose to link, by statute, its judicial jurisdiction directly to the federal law in that area as the applicable limitation on state power, then the state statute's validity and the permissible scope of its interpretation is a matter of federal law. *See Breisch v. Central R.R.*, 312 U. S. 484, 491 (1941); *Tipton v. Atchison T. & S. F. Ry.*, 298 U. S. 141, 151-152 (1936).

The state supreme court's construction of Chapter 27-19 of the state judicial code imposes an absolute jurisdictional bar against Indian suits arising on-reservation. That bar, according to the state court, is derived from the federal authority contained in Pub. L. 280. That court, in its decision below, construed Pub. L. 280 as the federal statute authorizing North Dakota to adopt the jurisdictional rule represented by Chapter 27-19 of the North Dakota Century Code. Additionally, the state supreme court also read that federal statute as imposing, through the derived state statute, an absolute bar against state jurisdiction over Indian causes of action arising on-reservation until the Indians consent as a matter of state law to such state jurisdiction.

However, petitioner submits that neither the plain terms of Pub. L. 280 or its legislative history establishes a federal jurisdictional rule prohibiting the state courts of North Dakota from exercising jurisdiction over petitioner's private cause of action against a non-Indian engineering firm. Nor does the statute or a reading of its

legislative history support the state court's conclusion that Congress consented under Pub. L. 280 to the state's enactment of Chapter 27-19 of the state judicial code.

B. North Dakota's Failure To Accept Public Law 280 Jurisdiction Does Not Bar The Tribe's Negligence Action Against A Non-Indian In State Court

The state supreme court, in its decision below, reasoned that because North Dakota failed to accept the federal government's offer of jurisdiction over Indian affairs contained in Pub. L. 280—coupled with the state legislature's enactment of Chapter 27-19 of the state judicial code—that the state's courts are compelled to disclaim any jurisdiction over Indian claims arising on an Indian reservation in North Dakota. The state court's construction of the state law can be sustained only if Congress meant, in Pub. L. 280, to radically limit the territorial extent of state law. Additionally, Congress would have to have intended to deprive states that did not accept Pub. L. 280 jurisdiction of any jurisdictional authority at all over Indian claims if they arose within the boundaries of a reservation within those states.

However, both the legislative purpose of Congress in enacting Pub. L. 280, as well as the context of that statute, shows that the phrase "civil jurisdiction" as used in that statute has a clear and unmistakable referent quite apart from the existing state civil jurisdiction over actions such as the one at issue here. The underlying legislative history of the act emphasizes that it was intended to serve two larger goals of Congress: the termination throughout the United States of the subjection of Indians to special federal laws applicable only to Indians and the withdrawal of federal responsibility for Indian affairs wherever practicable.

The legislative documents show that Congress considered, as a necessary step prior to the transfer of any jurisdiction to the states by way of a federal transfer agreement, the repeal of the existing federal statutory status of Indians by eliminating the existing federal statutes referring specially to them and thereby setting them apart from other citizens.[6] The purpose of such a repeal was the abolishing of certain restrictions deemed discriminatory. *H. Rep.* No. 848, at 5.

Subsequent to this repeal, Congress would then be free to transfer its special authority over Indian affairs, in the civil law area as well as criminal, by permitting state courts to adjudicate civil controversies arising on-reservation and to extend to those reservations the sub-

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[6]The documents referred to are:

(1) H. Rep. No. 848, accompanying H.R. 1064, A Bill Amending Title 18, United States Code, Entitled, "Crimes and Criminal Procedure," with Respect to State Jurisdiction over Offenses Committed by or against Indians in Indian Country and to Confer on the State of California Civil Jurisdiction over Indians in the State, 83rd Congress, 1st Sess. (July 16, 1953) (hereinafter cited as H. Rep. 848).

(2) Senate Report No. 699, accompanying H. R. 1063, A Bill Conferring Jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with Respect to Criminal Offenses and Civil Causes of Action Arising within Such States, 83rd Congress, 1st Sess. (July 29, 1953) (hereinafter cited as S. Rep. No. 699).

(3) Transcript of Hearings on H.R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83rd Congress, 1st Sess. (1953). Those hearings have not been published, but the copies of the transcripts have been lodged with the Clerk of the Court. The June 29 transcript will hereinafter be cited as Hearing *Transcript I*, and the July 15 transcript will hereinafter be cited as Hearing *Transcript II*.

stantive civil laws of the respective states.[7] *S. Rep. No. 699*, at 5.

The testimony at the hearings on H. R. 1063, that as amended would become the basis for Pub. L. 280, was unabashedly in support of the proposed legislation as representing

> . . . a definite step forward in the inclusion into the general body of the Indians of that state with respect to civil and criminal jurisdiction so that they would be subject to the same laws and the same rules as other citizens. *Transcript I*, at 5 (statement of Harry A. Sellery, Jr., Chief Counsel, Bureau of Indian Affairs).

Testimony—it appears that no Indian leaders testified on the merits of this bill—was virtually unanimous that the limited relinquishment of the special federal power over Indian affairs and the general subjection of the Indians to state civil and criminal authority of the states would contribute directly to assimilation of the Indian into the larger social and political society of the United States. The bulk of the legislative record is concerned with one identified evil—the problem of inadequate law enforcement on reservations. *Goldberg*, at 555-558.

Congress hoped to enlist the states, via the exercise of their newly conferred authority over Indian affairs within their states, to assist the federal government both in the cure of the inadequate law enforcement on reserva-

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[7] The legislative history of H.R. 1063 also reflects its evolution from a bill intended to accomplish the limited purpose of the transfer of federal criminal jurisdiction to one state, California, to a general bill covering all states and authorizing them to assume, with certain important restrictions on their civil authority, criminal and civil authority over Indian affairs within their states subject to the terms of proposed legislation. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 540-544 (1975) (hereinafter cited as *Goldberg*).

tions and accomplishment of the broader goal of assimilation of the Indian into American society. *Bryan v. Ithasca County,* 426 U. S. 373, 387 (1976).

The phrase, civil jurisdiction, as used in the context of the legislative history of Pub. L. 280, refers directly to that special constitutional power conferred on Congress to legislate with respect to Indians in their status as Indians. That power exists in the federal government as a matter of constitutional necessity. *United States v. Kagama,* 118 U. S. 375, 384-385 (1886). Congress has exercised its power over Indian affairs on numerous occasions to enact a special body of statutory law to regulate Indian affairs. However, at the same time, Congress also has enacted statutes conferring general citizenship status on Indians so as to secure to them the general rights available to all other citizens under the Constitution and laws. 8 U. S. C. § 1401(2) (1978).

The legislative history of Pub. L. 280 clearly refers to the special statutory status of Indians created by Congress in the exercise of its authority over Indian affairs. It is this special body of law that witnesses before the Interior Committee thought should be abolished because the laws were discriminatory. *H. Rep. No. 848,* at 3.

Therefore, the proposed repeal of these ostensibly discriminatory statutes is closely correlated with the proposed transfer of federal jurisdiction to the states "permitting the state courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective states." *S. Rep. No. 699,* at 5. The reason for this close correlation of the repeal of the federal statutes peculiar

to Indians and the grant to the states of civil authority within that area seems clear enough: Congress wanted to remove the preemptive effect of statutes or treaties that might conflict with the states' exercise of jurisdiction in that limited area of delegation.

That the grant of civil jurisdiction Congress intended to confer on the states via Pub. L. 280 must be read *in paria materia* with the existing federal Indian law and treaties so as to define the federal subject matter jurisdiction being transferred to the states is made clear from the Ninth Circuit Court of Appeals decision in *Anderson v. Gladden*, 293 F. 2d 463 (9th Cir. 1961). Although that decision deals with the criminal jurisdictional section of Pub. L. 280, the same underlying principles of statutory construction govern the nature of the federal civil jurisdiction grant offered to states such as North Dakota:

> The power over Indians was deemed not so inherently or exclusively federal as to apply beyond the extent to which the federal government has preempted the field, and the federal government could thus withdraw from the field and turn the subject matter back to the states when it chose to do so. *Id.*, at 468.

Public Law 280 has been construed as effecting only a limited withdrawal of federal control or preemption in specific subject matter areas so that the states accepting jurisdiction under that statute would be free to exercise their legislative or judicial jurisdiction in those same areas. The major congressional study of the results of Pub. L. 280 confirms that both lower federal courts and state courts have construed the purpose of that statute the same way as did the appeals court in the *Gladden* decision. *Background Report on Public Law 280*, prepared at the request of Henry M. Jackson, Chairman, Committee on Interior

and Insular Affairs, United States Senate, 94th Cong., 1st Sess., at 38 (hereinafter cited *Background Report on Pub. L. 280*), citing *Robinson v. Wolff*, 349 F. Supp. 514, *aff'd.*, 468 F. 2d 438 (8th Cir. 1972); *Agua Caliente Band of Mission Indians v. Palm Springs*, 347 F. Supp. 42 (C. D. Cal. 1974); *Robinson v. Sigler*, 187 N. W. 2d 756 (Neb. 1971), *appeal dismissed*, 404 U. S. 987 (1971). Public Law 280 has consistently been construed as not intending to affect the existing state jurisdiction over actions under state law where non-Indians are the defendants. *Background Report on Pub. L. 280*, at 43.

This Court has held that states that accepted such special subject matter jurisdiction under Pub. L. 280 were thereby empowered to exercise their legislative and judicial jurisdiction in certain areas where the Constitution, statutes, treaties, and federal Indian common law had previously preempted such state authority. *Washington v. Yakima Indian Nation*, 439 U. S. 463, 479 (1979). (This Court rejected the tribe's claim that Pub. L. 280 had not abrogated the tribe's right to self-government under treaty.)

By contrast, however, the state court below read the phrase "civil jurisdiction," as used in Pub. L. 280, as encompassing not only such special federal jurisdiction, but as encompassing all jurisdiction over civil causes of action arising on a reservation and involving Indian parties as either plaintiff or defendant. Congress, according to the state court's view, intended either a broad grant or territorial jurisdiction over the reservation under Pub. L. 280 to the states if they accepted such authority or to prohibit entirely the state's exercise of jurisdiction over Indians if the states failed to accept that transfer of authority.

Thus, the state court reads Pub. L. 280 in its decision below as offering to the states a broad grant of jurisdiction conceived of in terms of territorial extent as against a limited grant of jurisdiction relating to a specific subject matter. Further, the court concludes that the state statute, Chapter 27-19, amending its judicial code, constituted a rejection of Pub. L. 280 jurisdiction and a prohibition against the exercise of state civil jurisdiction over all causes of action arising on a reservation and involving Indians in any way. 321 N. W. 2d 510, at 512 (N. D. 1982).

However, the legislative record of Pub. L. 280 reveals that state action under Pub. L. 280, either in accepting or rejecting the federal offer of jurisdiction, was not intended to have such a disruptive effect on the existing state law systems. The Chief Counsel, Mr. Abbott, proposed to the House Committee on Interior and Insular Affairs, certain amendments to H. R. 1063 so that the proposed legislation could be transformed into a general statute whereby all states could acquire federal power to control some aspect of Indian affairs within their respective states. The purpose of such amendments was to provide a general statutory mechanism whereby the United States could cede its authority, subject to restrictions not relevant here, to the states. Such a procedure, however, had to take into account certain historical and legal factors that set some of the Western states apart from other states. The Committee's Chief Counsel pointed out that these states had so called disclaimer provisions, both in the enabling acts admitting them to the Union and in their own state constitutions. Therefore, counsel recommended that certain procedural amendments be adopted to meet their situation and to enable them to participate in the Pub. L. 280 program. Consequently,

> . . . the bill as acted upon by the Committee makes provision for eight states which have constitutional organic impediments for accepting state jurisdiction, the enabling acts for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah, and Washington, provided that exclusive federal jurisdiction would be retained. *Transcript II,* at 2-3.

Such state disclaimers, the Chief Counsel concluded, would disable those eight states from accepting the contemplated federal offer of jurisdiction under the proposed act and would consequently defeat the general applicability of the act. Therefore, the Chief Counsel advocated certain procedural amendments to the legislation that would avoid that result. Congress, under the proposed amendments, would consent to any of those eight states removing the disclaimers in their constitutions so as to enable them to accept the offered federal jurisdiction. That the purpose of these amendments was solely to authorize the removal of a perceived federal barrier to the acceptance of such jurisdiction as would be offered by the Act is made clear in the exchange regarding the effect of the proposed amendments:

> Mr. Dawson: One thing you can be assured of, *the state would not be harmed by this provision,* because you are simply giving them the right to pass legislation if they see fit to do so. (emphasis added)
>
> Mr. Pillion: It would not *increase* their jurisdiction automatically. (emphasis added)
>
> Mr. Dawson: No, anymore than it will Nevada's. If Nevada does not want to take this expense, they certainly do not need to pass any legislation to take it on. *Transcript II,* at 13.

Petitioner submits Congress' desire to achieve nationwide generality in the application of the new statute, Pub. L. 280, explains fully the procedural amendments to that

Act allowing disclaimer states such as North Dakota to amend their state constitutions and thus remove a federally-imposed disability. It was not intended, as the state court interprets it, to have a substantive effect, as a congressional prohibition of state civil jurisdiction over state court actions that are outside the limited, special Indian subject matter areas controlled by Congress.

Such a construction of that statute would be in direct conflict with the statute's larger purpose: to assimilate the Indian into the general society. Allowing the state to completely cut off Indian access to state court through legislative action under Pub. L. 280 would be inconsistent, to say the least, with that federal goal. Additionally, Congress did not intend to diminish the existing rights of Indians to state court under state law through any action purportedly authorized by Pub. L. 280.[8]

Therefore, the state court's result below depends on a number of interlocking assumptions that, viewed in light of the legislative history of Pub. L. 280, turn out to be false. The first assumption that the phrase "civil jurisdiction," as used in the statute, refers to all and any exercise of state judicial authority over all Indian claims aris-

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[8]Article I, § 22 of the North Dakota Constitution provided that all the courts shall be "open to every man" and that he shall have a remedy by due process of law "for any injury done to him." (A. 2a.) This state-declared right of access to the state's courts is presumably protected and secured to Indian citizens by the due process clause of the Fourteenth Amendment of the United States Constitution. *C.f., Mobile & Ohio Railroad v. Tennessee,* 153 U. S. 486, 506 (1894).

The power to regulate jurisdiction is the power to regulate rights. If Congress had intended by Pub. L. 280 to withdraw absolutely from state cognizance all subject matter jurisdiction over such claims without creating any federal forum for the vindication of those same rights, then serious constitutional issues would arise. *Murray's Lessee v. Hoboken Land and Improvement Co.,* 18 U.S. (How.) 272, 284 (1856).

ing on-reservation is patently false. The legislative record makes clear that the phrase "civil jurisdiction" refers to state authority that could not have been previously exercised by the state courts because federal authority had pre-empted the subject matter jurisdiction of the state courts in that area. The joint repeal of such federal statutes or treaties and the grant to the state of federal civil authority would authorize the state to exercise jurisdiction in certain subject matter areas where it would otherwise be preempted from doing so. *Washington v. Yakima Indian Nation,* 439 U. S. 463, 479 (1979).

The state court's second assumption that North Dakota, by refusing to assume jurisdiction of Indian affairs under Pub. L. 280, was then enabled by congressional consent to enact Chapter 27-19 of its judicial code and thereby remove all jurisdiction over any Indian claims arising on a reservation in that state is not supported by any congressional intent at all. The Indian, as an aspect of his citizenship rights protected by the Fourteenth Amendment, is entitled along with other state citizens to sue in state court to protect his property rights. *See Bird v. Terry,* 129 F. 472, 477 (C.C.W.D. Wash. 1903); *Deere v. New York,* 22 F. 2d 851, 853 (N. D. N. Y. 1927). There is not a shred of evidence in the legislative record of Pub. L. 280 that Congress intended as a consequence of a state's nonacceptance of the federal civil jurisdiction offered under that statute that its Indian citizens could be deprived of their right to access to state court to protect their rights on the same terms as other state citizens.

On the contrary, this Court's decisions support the proposition that state action, either accepting or rejecting the grant of Pub. L. 280 jurisdiction, must be read with reference to what Congress intended to grant to the states

under that statute. This Court, in *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973), held that Pub. L. 280, as amended, conferred upon the states "the right to disregard enabling acts which limit their authority over Indians," *McClanahan,* at 177. Since Arizona, like North Dakota here, never complied with the Act, it had no authority to impose its income tax statutes on a reservation Indian. However, this Court also pointed out that Indians, as citizens, have the right of access to state courts. *McClanahan,* at 173. Thus, there is no relationship between North Dakota's failure to accept Pub. L. 280 jurisdiction and the Indian's right of access to state court as a citizen. This conclusion is confirmed by this Court's recent decision holding that Pub. L. 280, aside from the specific sections prohibiting state jurisdiction over particular subject matter, has little bearing on whether a state has jurisdiction over a particular Indian case or subject matter. *Arizona v. San Carlos Apache Tribe,* 51 U.S.L.W. 5095, 5099 (U.S. June 28, 1983).

Further, the state court's interpretation of Pub. L. 280 imposes new and novel conditions not contemplated by Congress. These conditions, far from being authorized by that federal statute or consistent with its purpose, is in fact an unauthorized attempt to defeat the clear Congressional purpose expressed in Pub. L. 280. Recently, the State of Nebraska sought to deny the effectiveness of its prior state consent to the retrocession by the state of the special federal jurisdiction it had received over a reservation under Pub. L. 280 by imposing subsequent state conditions on that consent. The federal district court held that it was impermissible for a state to attempt to defeat or interfere with the workings of the federal retrocession process established by Section 403 of Pub. L. 280, 25 U.S.

C. § 1323, as amended, through the imposition of additional state conditions intended to defeat its earlier consent. *Omaha Tribe v. Walthill*, 334 F. Supp. 823, 831 (D. Neb. 1971), *aff'd.*, 460 F. 2d 1327 (8th Cir. 1972).

Here, the state condition that defeats Pub. L. 280's larger purpose is the requirement that Indians consent to full jurisdiction by the state over the reservations before they can sue to protect any on-reservation property interest in state court. That state condition conflicts with Pub. L. 280's larger purpose of assimilating the Indian into state society. Congress, through Pub. L. 280, wanted the states to affirmatively act to assume jurisdictional responsibilities over the Indian that would foster his acculturation—not to impose barriers to state court by way of consent requirements that operate to take away his existing rights under state law. *See generally, Kennerly v. District Court*, 400 U. S. 423 (1971). Also, this Court has held that the limited civil jurisdictional effect of Pub. L. 280 was to allow Pub. L. 280 states to apply their own rules of decision in suits involving reservation Indians. *Bryan v. Ithasca County*, 425 U. S. 373, at 384, 385 (1976).

Public Law 280 is therefore simply irrelevant to the determination as to whether the North Dakota state courts have jurisdiction over petitioner's negligence action. *Arizona v. San Carlos Apache Tribe*, 51 U.S.L.W. 5095, 5099 (U. S. June 28, 1983).

C. There Is No Federal Decisional Rule Barring Petitioner's Action In State Court

State court is the proper forum for the adjudication of this action. The appropriate analytic approach in determining whether a North Dakota state court can hear the Tribe's claim against a non-Indian was established by

this Court in *William v. Lee*, 358 U. S. 217 (1959). This Court disallowed, in *Williams*, state court jurisdiction over a non-Indian claim for a debt against a Navajo Indian. The proper forum for adjudication of that claim was tribal court, not state court. This Court found that the federal policy of encouraging and strengthening tribal courts, as well as the fact that the Navajo Court of Indian Offenses was open to non-Indians and could hear debt actions, tipped the jurisdictional balance in favor of tribal court jurisdiction and against state court jurisdiction. *Williams*, 358 U. S. at 222.

Conversely, this Court has held that where a non-Indian's conduct is at stake, as it is here, a state may assert both its legislative and judicial jurisdiction to regulate such behavior as long as it does not infringe on protected tribal or federal interests. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164, 172-173 (1973).

There is no federal decisional rule that bars petitioner's action in state court. On the contrary, generally in matters not affecting the federal government or tribal regulation, an Indian has the same status to sue in state court as any other citizen. F. S. Cohen, *Handbook of Federal Indian Law* (1971 Reprint, University of New Mexico Press), at 379. This rule has been maintained by this Court over the years without fundamental alteration. *Felix v. Patrick*, 145 U. S. 317 (1982); *Williams v. Lee*, 358 U. S. 217 (1959).

Felix v. Patrick involved a suit by Indians to recover scrip allegedly taken by fraud. The action was not brought until 27 years after the fact. In response to the defense of laches, plaintiffs argued that as Indians they were not United States citizens and therefore not able to sue in federal courts. This Court rejected that contention:

> It is scarcely necessary to say in this connection that, while until this time they were not citizens of the United States, capable of suing in the Federal Courts, the Courts of Nebraska were open to them as they are to all persons irrespective of race or color. *Id.*, 145 U. S. at 332.

This early decision holding that Indians are presumed to have access to state courts as part and parcel of those citizenship rights that they share with other state citizens, has many times been reaffirmed by this Court. Only recently this Court, in *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973), declared its position that there is no federal barrier to suits brought by Indians against non-Indians in state court. *McClanahan*, 411 U. S. at 172-173.

There is not one decision of this Court that supports the state supreme court's decision below barring, as a matter of federal law, suits by Indians against non-Indians in state courts on essentially state-created rights of action. Instead, this Court has indicated that state courts have an important role to play in providing both right and remedy for Indian plaintiffs who sue non-Indian defendants.

The present principles applied by this Court in cases involving non-Indians reflect a rejection of arbitrary and rigid jurisdictional limits based on claims of territorial sovereignty by either states or tribes. Instead, this Court has favored jurisdictional principles that are based on considerations of fairness and the furtherance of legitimate interests of both the state and tribe that are asserting jurisdiction over the action. *Williams v. Lee*, 358 U. S. 217 (1959); *Fisher v. District Court*, 424 U. S. 382 (1976).

The state court's decision here on review represents a wooden approach to state jurisdiction in Indian affairs based on a territorial concept of jurisdiction. That concept is used here to defeat absolutely Indian claims against non-Indians in state court. The governing jurisdictional principles that this Court has declared are far more flexible by comparison and are adapted to the protection of Indian and non-Indian litigants' rights in the most appropriate forum for their resolution:

> . . . cases applying the *Williams* test have dealt principally with situations involving non-Indians. (citations omitted) In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the state could protect its interest up to the point where the tribal government would be affected. *Id.*, at 179.

The state court below cites this Court's decision in *Williams* as requiring the imposition of an absolute jurisdictional bar against state jurisdiction over Indian claims arising on-reservation. *Gourneau v. Smith*, 207 N. W. 2d 256, 259 (N. D. 1973). The *Williams* principle did not prohibit state jurisdiction over Indians or their claims. The *Williams* principle, as elaborated by this Court, has as its purposes the protection of two important interests. First, that rule is intended to prevent the operation of state law that would interfere with the effective discharge of responsibilities that Congress has assumed with respect to Indians and Indian affairs. Consequently, this Court has disallowed the imposition by the State of Arizona of its income tax on the sales to Indians of an Indian trader on the Navajo Indian Reservation. *Warren Trading Post v. Arizona's State Tax Commission*, 380 U. S. 685 (1965). This Court emphasized the federal in-

terest involved as evidenced by the historical control and regulation of Indian traders on-reservation. The imposition of a state tax, and its collection especially, could, this Court held, burden or frustrate the congressional interest in ensuring that no burden was placed on Indian tribes under federal supervision. *Id.*, at 691.

Second, the *Williams* rule is intended to protect Indian tribes and their members from the possibility of abusive state legislative action. Thus, this Court has rejected the efforts of state tax authorities to impose their income tax laws on an Indian who received all his income on-reservation. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973).

Nonetheless, the state court below has inferred from the decisions of this Court that it must automatically dismiss any Indian claim arising on a reservation. The court below has seriously misread the meaning of this Court's decisions. Those considerations that required the results in *Williams*, *Warren Trading Post*, and *McClanahan* are absent here. There are no competing federal or tribal interests that would defeat state judicial jurisdiction over petitioner's claim against a non-Indian. The tribe here has not asserted, through its tribal constitution, civil jurisdiction over non-Indians. *Quechan Tribe v. Rowe*, 531 F. 2d 408 (9th Cir. 1976). Presumably, the State of North Dakota has an interest in regulating a non-Indian's conduct where it is at issue in a case. Further, respondent here is defending this action in the state court under state law standards that generally govern the conduct of his business dealings.

The state supreme court has misapplied the federal standard developed in *Williams* in interpreting that rule as to require an absolute bar against Indian claims when

those claims implicate no overriding federal or tribal interests in any way.

III. Congress Did Not Consent To, Or Authorize North Dakota's Enactment Of Chapter 27-19 Of Its Judicial Code

A. Congress Imposed, Through Section 7 Of Public Law 280, Strict Requirements That North Dakota Failed To Meet

Congress consented, under Section 7 of Pub. L. 280, to the "affirmative assumption of state jurisdiction" over Indian affairs within the subject matter areas outlined by that federal statute. *Washington v. Yakima Indian Nation*, 439 U. S. 463, 486, ft. n. 30 (1979). Chapter 27-19 of the state judicial code does not constitute an assumption of jurisdiction at all (A. 4a). Instead, that legislation requires tribal consent, and in some instances the individual's consent, prior to the state's assumption of any jurisdiction under Pub. L. 280. This is expressly the kind of state legislative scheme that this Court has identified as failing to meet the strict federal requirements of "affirmative state legislation" under Section 7 of the Act. *Kennerly v. District Court*, 400 U.S. 423 (1971).

Congress imposed, in Section 7 of Pub. L. 280, a clear standard that states such as North Dakota had to comply with in order to receive any delegated powers from the federal legislature. *United States v. Chicago R.I.&P.R. Co.*, 282 U.S. 311, 324 (1931).

This Court has ruled, in the enforcement of that standard, that the eligible states must, in order to comply with the strict requirements of Section 7, manifest by political action their willingness and ability to discharge their new responsibilities. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 486-487. This political action must be evidenced by "affirmative legislative action"

binding the state to accept jurisdiction over Indian affairs within its state. *Kennerly v. District Court,* 400 U. S. 423, 427 (1971).

The state supreme court, construing Chapter 27-19 of its state judicial code, concluded that North Dakota, far from affirmatively accepting any delegated jurisdiction under Pub L. 280, intended by the state act to reject any jurisdiction it may have had prior to Pub. L. 280's date. Therefore, the state court's interpretation of this Court's decision in *Washington v. Yakima Indian Nation,* 439 U.S. 463, 500 (1979), as impliedly sanctioning the jurisdictional rule or pattern declared in the decision below is seriously in error. This Court found there that Washington had effectively accepted the jurisdictional offer contained in Pub. L. 280 and had partially assumed the jurisdictional responsibilities of the federal government in Indian affairs as intended by that statute. This Court further held in *Yakima* that Washington, in the exercise of its federally-delegated authority, could shelter under the plenary authority Congress enjoys over Indian affairs against the Tribe's equal protection challenge to Washington's jurisdictional scheme. *Id.,* at 501.

Here, North Dakota has attempted to repudiate any jurisdictional responsibilities under the federal statute. The state court concludes that such a repudiation has been consented to by Congress in Pub. L. 280. However, its scheme, as represented by Chapter 27-19 of its judicial code, is of the express type disapproved by this Court as being insufficient to meet the standards contained in Section 7 of the Act in *Kennerly v. District Court,* 400 U.S. 423 (1971). State courts have likewise recognized that Section 7 of Pub. L. 280 requires affirmative state legislation in order to confer any federal jurisdictional authority on the states under that federal statute. *See*

generally, State v. Molash, 199 N.W.2d 591 (S.D. 1972); *Morgan v. Colorado River Indian Tribe,* 436 P.2d 484 (Az. 1968), *vacated on other grounds,* 443 P. 2d 421 (1968); *Whyte v. District Court,* 346 P. 2d 1012 (Colo. 1959), *cert. denied,* 363 U. S. 829 (1960).

Consequently, the fundamental condition for the validity of the state jurisdictional pattern—set forth at Chapter 27-19 of the state judicial code—as a federally delegated exercise of jurisdiction over Indians is that the state comply with Section 7 of Pub. L. 280. This Court's decision in *Kennerly* confirms that North Dakota did not. The state's failure to comply with the plain requirement of Section 7 of the federal statute defeats the state court's contention that the state statute is a federally-sanctioned jurisdictional rule compelling the Indians to consent to state jurisdiction before they can have access to state courts. *Washington v. Yakima Indian Nation,* 439 U. S. 463, 500 (1979).

The state statute, Chapter 27-19 of the N.D.C.C., given that it represents neither a federally-compelled or authorized federal judicial rule over Indian affairs, then did not alter, as a matter of federal law, the existing state judicial authority before the enactment of Pub. L. 280. That Congress did not intend to disrupt the underlying state judicial authority to hear Indian claims against non-Indians by the passage of that federal statute is confirmed by later congressional assessment of Pub. L. 280's purpose and impact. *Background Report on Public Law 280,* at 38.

B. Congress by its 1968 amendments to Public Law 280, has rendered moot the state court's assumption that petitioner must consent, as a matter of federal law, under Chapter 27-19 of the state judicial code as a prerequisite to state court's jurisdiction over petitioner's action.

The state statute cannot serve as a federally-approved jurisdictional rule to control Indian access to state court in the light of the 1968 amendment to Pub. L. 280. *See Background Report on Public Law 280*, at 27-37.

The reason Congress changed Pub. L. 280 radically in 1968 is clear from the legislative history of the 1968 amendments. Pub. L. 280, by all accounts, proved to be a total failure. Congress had hoped that many of the so-called "optional" states such as North Dakota would come forward and take over where the federal government would leave off in the affirmative governance of Indian affairs, especially in the law enforcement area.[9] Com-

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[9]In any event, the lack of success in Pub. L. 280's assimilation of the American Indian into the broader civil society was due, at least in part, to the states' unwillingness to accept the burden of law enforcement on the reservations. Burnette, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 Harv. J. on Legislation 557, 587 (1972) (hereinafter cited as *Burnette*). By the early 1960s it became increasingly clear to some congressmen that Pub. L. 280 had failed as a tool to resolve the problems that it was intended to resolve. About that time, in 1961, Senator Sam Ervin began a series of congressional field hearings, through the Senate Judiciary Subcommittee, on the legal status of the Indian and the problems he encountered when he asserted his constitutional rights in his relations with state, federal, and tribal governments. See S. Rep. No. 841, accompanying S. 1843, 90th Cong., 1st Sess. (Dec. 6, 1967) (This report distills the essence of the testimony received in the series of the field hearings and also summarizes the legislative history of predecessor bills to S. 1843.)

The hearings, that included extensive tribal testimony, convinced Senator Ervin of the need for the amendment of Pub. L. 280—especially the imposition of a tribal consent requirement as a matter of federal law prior to any assumption of state jurisdiction under that law. See S. Rep. 841, at 10-11. See also Hearings before the House Subcommittee on Indian Affairs, on H.R. 1519, 90th Cong., 2d Sess. (March 29, 1968).

Although Senator Ervin had proposed tentative bills aimed at amending Pub. L. 280 prior to 1968, those bills were markedly unsuccessful before the House Committee on Interior and Insular Affairs. One commentator concluded that the reason for this lack of success can be assigned to the presence of powerful opposition from representatives from some western states

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mentators suggested that one reason for the failure of Pub. L. 280, though by no means the only reason, was the states' reluctance to assume the associated costs attributable to becoming the primary authority responsible for governance of Indian affairs in the jurisdictional areas covered by that federal statute. *See Goldberg,* at 551-558. Whether this factor entered into North Dakota's decision not to accept any Pub. L. 280 jurisdiction over the Indian reservations within its boundaries is not clear from the scanty legislative record behind that state's constitutional amendment or its legislative enactment, Chapter 27-19 of its judicial code in 1963.

The new Indian Civil Rights Act, enacted as a title of a larger general civil rights act, repealed Section 7 of Pub. L. 280 and replaced it with an exclusive federal procedure requiring Indian consent, whereby states in the future could acquire jurisdiction over Indian affairs. 25 U. S. C. §§ 1321-1326 (1983) (A. 6a, 7a, 8a).

Subsequent to these amendments, a state may acquire delegated federal jurisdiction in the special subject matter areas covered by Pub. L. 280 only by strict compliance

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who wished to see Pub. L. 280 remain intact so as to provide a tool for state control of certain aspects of reservation activity. *See Burnette,* at 606.

Therefore, Senator Ervin was unable to realize his goal of protecting the constitutional rights of Indians and amending Pub. L. 280 until 1968, when he was able to tack his Indian bill, S. 1843, onto the proposed 1968 Civil Rights Act, H.R. 2516. The public clamor, both for and against the broader civil rights legislation, provided an opportunity for Senator Ervin to either amend H.R. 2516 into defeat, counting on strong western opposition in the House against the Indian Rights Bill, or to have it pass the House with his Indian bill of rights attached. Unfortunate broader historical and social events, such as the slaying of Dr. Martin Luther King, compelled Congress to act on the broad 1968 Civil Rights Act without undue delay, and the opposition to the Indian rider on H.R. 2516 was simply overwhelmed. *See Burnette,* at 604-611.

with 25 U.S.C. §§ 1321-1326. *Kennerly v. District Court*, 400 U. S. 423 (1971). Tribal consent to such a proposed state assumption of jurisdiction is effective only if manifested in accordance with the provisions of 25 U. S. C. § 1322(a). *Kennerly*, at 427. Consequently, tribal consent under Section 27-19-02(1) or (2) of the North Dakota judicial code to the state's assumption of jurisdiction over the reservation under Pub. L. 280 would be entirely meaningless (A-4a). *Cf., Nelson v. Dubois*, 232 N. W. 2d 64 (N.D. 1975) (The state supreme court held that the 1968 amendments to Pub. L. 280 had preempted Section 27-19-05 of the state judicial code which had authorized individual Indians to confer, by consent, civil jurisdiction upon the state) (A4-a).

Petitioner has shown that, as a matter of federal law, Pub. L. 280 is no barrier to state court jurisdiction over an Indian's claim against a non-Indian based on a state-created cause of action. Further, tribal consent under state law has likewise been rendered irrelevant by the 1968 amendments to Pub. L. 280 as a condition for the extension of state jurisdiction under Pub. L. 280 to the reservations.

There has never been a federal jurisdictional principle, contrary to the assumption of the state court below, requiring Indian consent to state jurisdiction under Pub. L. 280 as a condition of his right to sue a non-Indian in state court on a state-created right of action. The state statute in question, when read in this light, that requires tribal consent to Pub. L. 280 jurisdiction as a condition of access to state courts, represents an indefensible condition on the exercise of a fundamental constitutional right. *See* Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Col. L. Rev. 321 (1935). Congressional

consent, under Pub. L. 280, to such a state statute was never given. *Kennerly v. District Court*, 400 U. S. 423, 425 (1971). Consequently, North Dakota cannot defend its statute as a derived exercise of federally delegated authority under Pub. L. 280. *Compare Washington v. Yakima Indian Nation*, 439 U. S. 463, 501 (Washington effectively accepted the jurisdiction under Pub. L. 280, and therefore, state legislation enacted under the express authority granted by Congress under that federal statute was immunized from the strict scrutiny on judicial review that otherwise might be applicable to such legislation.)

IV. Chapter 27-19 Of The North Dakota Judicial Code, As Construed By The State Supreme Court, Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment

A. Introduction

Chapter 27-19 of the state judicial code bars the adjudication by state courts of cases involving Indian parties and arising on an Indian reservation in the state. The state supreme court concluded that the state legislative assembly intended to deprive the Indians of access to state court to adjudicate their claims unless those Indians consented under Chapter 27-19 to state jurisdiction over their reservations. Petitioner submits that this exclusion of a discrete, insular minority from state court by state legislative action violates the equal protection and due process clauses of the Fourteenth Amendment.[10]

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[10]This Court has confirmed that the state citizen's right to sue in state courts, on the same terms as other persons under state law, is protected by the Fourteenth Amendment.

> . . . an individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, *to sue in the courts*, . . .

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North Dakota, in common with other Western states, established a constitutional judicial administration that assured every man that the state courts were available to him for the redress of any injury he might suffer. N. D. Const. Art. I, § 22.[11] (A. 2a). Indians, along with other people, are entitled to seek judicial relief in state court. *Rolette County v. Eltobgi*, 221 N. W. 645 (1974). Nonetheless, the state supreme court has construed Chapter 27-19 as singling out cases, based in the constant factors of Indian identity and reservation origin, that cannot be heard by state courts. There are two reasons why this state legislative action is invalid under the Fourteenth Amendment: First, this statute deprives petitioner of liberty and property without the due process of law; and, second, this statutory classification is invalid under the equal protection clause of the Fourteenth Amendment.

The liberty to sue in state courts is one that has been acknowledged as so fundamental to the democratic process as to be worthy of protection under the due process clause of the Fourteenth Amendment.[12] Therefore, this

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. . . [the] abrogation and denial of rights . . . for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied . . . (emphasis added). *The Civil Rights Cases*, 109 U.S. 3, at 11, 17-18 (1883).

[11]North Dakota, like other states, has a constitutional bill of rights guaranteeing, among other things, open courts. Deaby, *The Growth of American State Constitutions* (DeCapo Press: 1972), at 125.

[12]Congress, in debating the merits of the proposed Fourteenth Amendment to the Constitution, clearly contemplated that state-created rights, such as open and available courts for redress of injury, were to be secured to all the citizens of a state on the basis of equality.

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Court, from early on, has adopted a three-part test to determine if state legislation that seeks to curtail these rights is valid:

First, such legislation is assumed to be unconstitutional unless the state effectively rebuts that presumption;

Second, the state must show that the legislation advances a "compelling state interest"; and,

Third, the legislation must be narrowly drawn so as to represent the least restrictive alternative solution to the problem. *See generally, United States v. Carolene Products*, 304 U. S. 144, 152-153, n. 4 (1938).

B. The State Statute Clearly Conflicts With The Petitioner's Due Process Rights

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The congressional debate on the resolution offered by Congressman Thadeus Stevens on December 4, 1865—that was later, as amended, to become the Fourteenth Amendment—focused on what rights were to be protected by this amendment. Representative Stevens, himself, viewed as fundamental the requirement that all laws—state and national—operate impartially and equally on all persons without regard to race or color. Consequently, the result was the inclusion in section one of the amendment of language prohibiting the states from abridging the rights accorded under law generally. Thus, Congressman Stevens described the intended reach of this section in these terms: "Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all." The Debate, House of Rep., 39th Cong., 1st Sess. (May 8-10, 1866), *reprinted* at Schwartz, *Statutory History of the United States: Civil Rights*, Part 1, at 222-223.

Senator Howard Jacob, referring to the federal courts' interpretation of what rights are protected under the privileges and immunities clause of the Constitution, viewed *Corfield v. Coryell*, Case No. 3230, 4 Wash. 371 (C.C.E.D. Pa. 1823), as securing to the state citizens the right to sue in state courts on the same terms as other citizens. The Debate, Senate, 39th Cong., 1st Sess. (May 23-June 8, 1866), *reprinted* at Schwartz, Bernal, at 257-259.

The legislative history of Section 1 of the Fourteenth Amendment clearly secures the right to petitioner to sue in state courts on the same terms as everyone else under state law.

The state supreme court has construed Chapter 27-19 of the state judicial code as imposing a complete bar to the state district court's jurisdiction over Indian claims arising on-reservation. The court's application of that jurisdictional rule to the Tribe's claim against a non-Indian engineering firm means its claim, based on a state-created right and seeking a state-created remedy, has been terminated without any opportunity for a hearing on the merits.

As has been pointed out, the federally-approved constitution of the Tribe does not provide for jurisdiction over non-Indians, unless they consent to such jurisdiction. Even if a tribal court forum existed, any tribal judgment would have to be enforced through the state courts, and recent decisions of the state supreme court have cast serious doubts as to whether these tribal judgments would be accorded full faith and credit or comity by the state courts. *Lohnes v. Cloud,* 254 N. W. 2d 430 (N. D. 1977). There is no federal jurisdiction over this action in federal district court. *Schantz v. White Lightning,* 502 F. 2d 67 (8th Cir. 1974).

Therefore, the considerations presented by the facts of this case are similar to those that were at stake in this Court's decision in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673 (1930). There, the plaintiff sued to enjoin the county treasurer from collecting an allegedly discriminatory tax. The plaintiff had failed to present his claim that the tax, as applied to him, was discriminatory before the state tax commission. The Missouri Supreme Court affirmed the trial court's dismissal of the taxpayer's action without a hearing on the merits. This Court concluded that the practical effect of the Missouri court's judgment was to deprive the plaintiff of property

without affording him any opportunity to be heard in his defense. The court also found that the plaintiff had no alternative forum in which to present his claim. *Id.*, at 679.

This Court, on review, found that controlling issue to be one of procedural due process: "whether it (the plaintiff) had had an opportunity to present its case and be heard in its support." *Id.*, at 681. The Supreme Court then evaluated whether the plaintiff had been accorded any meaningful due process. The Court left no doubt on this issue:

> But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. (citations omitted). *Id.*, at 682.

This Court has extended that rule to require a reasonable opportunity for a hearing before the state may deprive a person of a property right under its garnishment procedures. *Sniadich v. Family Finance Corporation,* 395 U. S. 337 (1969). This Court further extended this principle by holding that among the civil rights protected from discriminatory state action are the rights to acquire, enjoy, use, and dispose of property. *Lynch v. Household Finance Corporation,* 405 U. S. 538, 544 (1971). This Court, in *Lynch,* cites as support for constitutional protection of the property interest at stake in that case Section 1 of the 1866 Civil Rights Act that enumerates, among other basic civil liberties, the right "to make and enforce contracts, to sue" in court to enforce those contracted rights.

Lynch, 405 U. S. 538, 543. The property interest the petitioner seeks to enforce here is at least as vital and significant to the persons affected adversely by the state action as that complained of by the affected parties in *Lynch* and *Sniadich*. Without the ability to recover in contract actions many of petitioner's programs on which its people depend would be adversely affected. Thus, strict scrutiny of the state statute is justified under that standard declared by this Court when state legislation clearly affects rights protected by the Fourteenth Amendment. *United States v. Carolene Products*, 304 U. S. 144, 152-153, n. 4 (1938).

The state court here, in construing Chapter 27-19 of the state judicial code, has closed the doors of the courts without according petitioner any opportunity for a hearing. The state court deemed that state law to be authorized or required by federal law. However, based on the foregoing analysis, it is clear that the federal government has no policy or interest in precluding petitioner's action in state court. The state court has given no other reason for denying petitioner the due process of law secured to every other plaintiff by the force of the North Dakota Constitution and its statutes, as well as by the Fourteenth Amendment. This Court has recognized that claims for relief, such as petitioner's claim here, is a protected interest under due process. *Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 428 (1982).

Therefore, petitioner submits that the state court's decision below, denying it and all other Indian plaintiffs an opportunity to be heard on any claim arising on-reservation, is clearly violative of due process.

C. The Appropriate Standard Of Judicial Review Of This State Legislations Is Strict Scrutiny

State legislative classifications that single out for discriminatory treatment, discrete and insular minorities, such as Indians, are subject to a more severe and searching standard of judicial review than is otherwise the case. *Loving v. Virginia,* 388 U. S. 1. (1967). Petitioner is barred from state court here solely because the state legislature has enacted a state statute, Chapter 27-19, of the Century Code, barring suits by Indians unless they consent under state law to state jurisdiction on-reservation. The legislation singles out, on its face, Indians as the exclusive category to be affected by this legislation.[13]

The petitioner has already shown that the framers of Section 1 of the Fourteenth Amendment intended to protect the right to sue in state court on equal terms. The state supreme court clearly regarded the state statute in question requiring the court dismissals of Indian claims arising on-reservation as the exclusive basis for denying Indians access to state courts. Thus, this Court's require-

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[13]Petitioner does not contend that Indians constitute a distinct racial classification. *Morton v. Mancari,* 417 U.S. 535 (1974). However, this Court has recognized that certain minorities, while not racially distinct, may in the nation's experience suffer from such prejudice and hostile treatment at the hands of state legislatures that this Court shall protect such "classes or castes" under the Fourteenth Amendment. *Plyer v. Doe,* 457 U.S. 202, 217, n. 14 (1982) (This Court voted 5-4 that a Texas statute which withholds from local school districts any state funds for the education of children who were not "legally admitted" into the United States and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Constitution.)

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ment that the state legislative infringement on a right be direct and not peripheral is met here. *United States v. O'Brien*, 391 U. S. 367, 385 (1968).

Strict scrutiny of state discriminatory legislation means that, on review, this Court engages in no presumption as to the validity of the legislation in question. On the contrary, the state is required to demonstrate that its classification serves a compelling state governmental interest. *Plyer v. Doe*, 457 U. S. 202, 217 (1982).

Here, the state supreme court, far from identifying any state interest that is served by the state statute in question, explained that it was required or authorized by federal law. Consequently, in rejecting petitioner's equal protection challenge to the statute, the state court asserted that the law was immune from such attack under federal law:

> [t]he people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its federal power over Indians when our Constitution was amended and Chapter 27-19, N.D.C.C., was enacted. We therefore find no equal protection violation of the Constitution of either the state or the United States and for the reasons stated on our opinion, affirm the judgment of the district court. 321 N. W. 2d 510, 513 (1982).

Petitioner has shown that Congress neither prohibited state jurisdiction over claims like petitioner's by enacting Pub. L. 280 nor consented to the state law, Chapter 27-19,

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This Court has recognized that Indians, as a discreet and powerless minority, may be vulnerable to the effects of hostile state legislation. *United States v. Kagama*, 118 U.S. 375, 384-385 (1886).

depriving petitioner and other Indians of access to state court. The state statute must stand on its merits as being a necessary legislative measure to meet some compelling state need. The state law has absolutely nothing to do with the federal purpose or policy, explicit or implicit, behind Pub. L. 280.

Regardless of whether a state borrows federal law to act as a guide for its own policy, the Court wrote:

> [that] to justify its use as a criterion for its own discriminatory policy, the state must demonstrate that the classification is reasonably adapted to 'the purposes for which the state desires to use it.' (citations omitted) *Plyer v. Doe*, 457 U. S. 202, 226 (1982).

The state supreme court has repeatedly disclaimed any independent state legislative interest in barring Indian suits in state court. *Rolette County v. Eltobgi*, 221 N. W. 2d 645, 648 (1974). Thus, the state advances no interest at all, compelling or otherwise, as the basis for sustaining such legislation. There is simply no good reason or state interest ground for depriving petitioner of access to state court. Federal law, in any case, prevents Indians from consenting to state jurisdiction under state laws such as Chapter 27-19. *Kennerly v. District Court*, 400 U. S. 423, 427 (1971). Indians could not comply with this state statute even if they wished.

D. The State Law In Question Does Not Represent The Least Restrictive Solution To Any Jurisdictional Concerns The State May Have

The state legislative classification here, even assuming that the legislative purpose in enacting the statute

was an attempt at resolving some jurisdictional concerns the state legislature had, represents an arbitrary means to achieve thta legislative goal. Linde, *Due Process of Law Making*, 55 Neb. L. Rev. 197 (1976). The power to regulate jurisdiction is the power to regulate rights. This Court has never allowed state legislatures to completely cut off access to state courts, otherwise afforded to a distinct group by the Constitution, as a legitimate means to solve the perceived regulatory concerns of a state legislature.

This Court has pointed out to state legislatures that a clear, legitimate procedure exists for the solution of regulatory problems that state legislatures may see arising from the presence of reservations within their state borders. *Kennerly v. District Court*, 400 U. S. 423 (1971) (Pub. L. 280, as amended by the provisions of 25 U. S. C. §§ 1321-1326, sets forth the manner in which state legislatures and tribal governments may resolve any jurisdictional issues).

This state legislation, as construed by the state supreme court, indiscriminately bars all Indian claims regardless of whether any legitimate federal Indian law or federal jurisdictional issues are presented by the facts of the case. Petitioner submits that the discriminatory legislative action is just unrelated to any legitimate goal.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the judgment of the Supreme Court of North Dakota be reversed.

Respectfully submitted,

17 Second Avenue West
Dickinson, ND 58601
(701) 225-6066

JOHN O. HOLM
Counsel for the Three Affiliated Tribes

Legal Department
Three Affiliated Tribes
P.O. Box 460
New Town, ND 58763
(701) 627-3621

CHRISTOPHER D. QUALE
RAYMOND CROSS
Counsel for the Three Affiliated Tribes

APPENDIX

N. D. Enabling Act:

The relevant portion of Section 4 of North Dakota's Enabling Act, 25 Stat. 677, incorporated in N. D. CONST. Art. XVI, § 203, reads:

> The people of North Dakota agree and declare that they forever disclaim all right and title to . . . all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

N.D. CONST. ART. I

Section 22. All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

N.D. CONST. ART. XVI, § 203, Amended and renumbered as ART. XIII, § 1 (2) reads in relevant part:

Section 1(2). The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the

United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the Legislative Assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by act of Congress.

. . .

N.D. CENTURY CODE (1974)

27-19-01. *Assumption of jurisdiction.*—In accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state shall be to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general application to private property shall have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state.

27-19-02. *Method of acceptance.*—Acceptance of Jurisdiction may be by either of the following methods:

(1) Upon petition of a majority of the enrolled residents of a reservation who are eighteen years of age or older; or

(2) The affirmative vote of the majority of the enrolled residents voting who are eighteen years of ge or older, at an election called and supervised by the North Dakota Indian Affairs Commission

upon petition of fifteen percent of those eligible to vote at such an election.

27-19-05. *Individual acceptance.* — An individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided. Such jurisdiction shall become effective on the date of execution of such statement. The statement accepting state jurisdiction shall be filed in the office of the county auditor of the county in which the person resides and when so filed shall be conclusive evidence of acceptance of state civil jurisdiction as provided herein.

SECTIONS 6 AND 7 OF PUBLIC LAW 280, 67 STAT. 589

Section 6: Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Section 7: The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, provided for in this Act, to assume jurisdiction at such time and in such manner as the people

of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

SECTION 402(a) OF PUBLIC LAW 90-284, 82 STAT. 79, CODIFIED AT 25 U.S.C. § 1322

§ 1322. Assumption by State of civil jurisdiction

(a) *Consent of United States;* force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

SECTION 404 OF PUBLIC LAW 90-284, 82 STAT. 79, CODIFIED AT 25 U.S.C. § 1324

§ 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or exist-

ing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title (25 USCS §§ 1321 et seq.). The provisions of this title (25 USCS §§ 1321 et seq.) shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

SECTION 406 OF PUBLIC LAW 90-284, 82 STAT. 79, CODIFIED AT 25 U.S.C. § 1326

§ 1326. Special election

State jurisdiction acquired pursuant to this title (25 USCS §§ 1321 et seq.) with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special electon held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 percentum of such enrolled adults.